# Supreme Court of the United States

OCTOBER TERM, 1942.

**No. 853.**

NELLIE C. BOSTWICK, JACKSONVILLE HEIGHTS IMPROVEMENT COMPANY, A FLORIDA CORPORATION, ET AL., PETITIONERS AND APPELLANTS BELOW,

VS.

BALDWIN DRAINAGE DISTRICT, C. T. BOYD, AND UNITED STATES OF AMERICA, RESPONDENTS AND APPELLEES BELOW.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

## REPLY BRIEF FOR PETITIONERS IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI.

### POINT I.

**The court of appeals erred in holding that the recital or decision in favor of jurisdiction contained in the order appointing a receiver in the original case of Louis Kreitmeyer v. Baldwin Drainage District was res judicata as to landowners, because the Drainage District was then the sole defendant and no landowner had yet been sued.**

Counsel for respondents do not attempt to contest the soundness of this proposition as applied to the original

order made in the *Kreitmeyer case,* opinion in which was reported 298 Fed. 604. The applicability of the group of four cases first cited page 27 of our petition and brief is not contested.

At page 2 of brief for respondents counsel attempt to bolster the holding of the Court of Appeals as to the original order appointing a receiver by quoting one ground of the motion to dismiss filed in the ancillary suit of *Hemphill* v. *Duval Cattle Company* that went to the Court of Appeals and was reported 41 F. 2d 433. The overruling of such a motion in the so-called ancillary suit cannot help, because jurisdiction had to exist in the main suit wherein the receiver was appointed or it didn't exist at all. Moreover the record in the suit of *Hemphill* v. *Duval Cattle Company,* judicially noticed by the District Court in this proceeding, showed by additional and supplemental grounds of the motion to dismiss and by briefs filed before the Court of Appeals that the only contention of a jurisdictional nature made in the ancillary suit was that Chapter 9129, Laws of Florida, 1923, undertaking to amend the Drainage Law by providing for the appointment of a receiver, was void in that same violated Article II and Section 27, Article III, of the State Constitution. No question was raised or discussed either in the lower court or in the Court of Appeals in the so-called ancillary suit as to lack of diversity of citizenship or as to the proper alignment of the parties. Furthermore, the so-called main suit had to stand on its own bottom and that bottom failed for reasons stated pages 3 to 5 of our petition and stated in Questions A to E, pages 15 to 17 of our petition. Counsel for respondents offer no answer to Questions A to E severally. They content themselves with the assertions of the Court of Appeals:

First, that the original Kreitmeyer order was *res judicata* as to landowners *not sued* and to *all the world,* and

Second, that the answer of petitioners as filed in the District Court was an incompetent collateral attack.

Counsel for respondents admit all that we showed by our petition for certiorari concerning *what appeared on the face of the record* in the original Kreitmeyer suit and in the so-called ancillary tax foreclosure proceedings.

The lapse of time noticed by counsel for respondents and the fact that no appeals were taken from the later orders in the ancillary suits ordering the issuance of master's deeds to the Drainage District are of no avail to sustain jurisdiction if jurisdiction did not originally exist or was lost by the disclaimers contained in the District's answer filed in the Kreitmeyer suit and quoted R. 168 to 175, or was lost by the disclaimers contained in the petitions of Kreitmeyer and the intervener Brown, quoted R. 177 to 182. A void decree gains no validity by the passage of time or by any action or non-action of parties or by subsequent orders of court. Nothing can operate to put life into what was and must remain a dead decree. 1 Freeman on Judgments (5th Ed.), Section 322. *U. S.* v. *Turner*, (8 C. C. A.) 47 F. 2d 86, 89.

## POINT II.

**The court of appeals erred in giving no heed to the interests and attitudes of the Drainage District as set forth in its answer filed in the Kreitmeyer case and quoted R. 168 to 175 and in giving no heed to the disclaimers of Kreitmeyer and Brown contained in their petitions filed after they got the order appointing a receiver (quoted R. 177 to 184) and in giving no heed to the language of the tax foreclosure decrees quoted R. 187 to 191, all showing by the face of the former records that no substantial controversy—no "Collision of interests"—remained between the bondholders and the district and that the district was in effect on the same side with the bondholders in enforcing a district cause of action against alleged delinquent property owners.**

## POINT III.

**The court of appeals erred in disregarding the further point that under the state statute invoked by the bondholder Kreitmeyer he was required to prosecute and did prosecute a drainage district cause of action. The court also erred in failing to attach any significance to the fact that the records made in the tax foreclosure proceedings showed that the specific "object sought" by the complaining bondholders was to use the receiver process and remedy provided for by what is now Section 1493, Compiled General Laws of Florida, rather than other available remedies equally efficacious under what is now Section 1473, Compiled General Laws, and that the difference in value of said remedies to the complaining bondholders was unsubstantial and insufficient to sustain federal jurisdiction.**

These points remain unanswered. The Court of Appeals gave no heed to these propositions. Counsel for respondents adopt the same course.

## POINT IV.

**The court of appeals erred in holding that the court in Hemphill v. Jacksonville Heights Improvement Co., on a bill to collect "instalment taxes" levied under what is now Section 1468, Compiled General Laws, had jurisdiction to enter a decree, contrary to the court's findings, and without the court's knowledge, for amounts which included for more than a one-sixth part void pretended maintenance taxes levied under what is now Section 1496, Compiled General Laws.**

This point, stated page 35 of our petition and brief, remains unanswered. The basis for this point was clearly set forth in Section XVI of petitioners' answer, R. 197 to 201 (see page 5 of our petition).

At page 5 of the brief for respondents counsel assert that we do not challenge the accuracy of the recital of facts

contained in the opinion of the Court of Appeals. We cannot agree with that observation either as to what was stated and especially with reference to what was omitted. The Court of Appeals omitted any comment whatsoever as to what the former record showed on this point discussed pages 35 and 36 of our petition and brief. The court did, however, make an irrelevant observation to the effect that Jacksonville Heights Improvement Company had not paid or offered to pay any taxes. This was noted page 18 of our petition, but that observation even if it had been relevant, in the light of the contest made by petitioners against all drainage taxes, was no possible answer to Point IV of our brief or to Question F of our petition, pages 17 and 18.

To hold that the court had jurisdiction to award recovery of amounts that included void "maintenance" taxes under a different section of the Statute, when not sued for and when the District Judge didn't even know such taxes were involved, is in conflict not only with *Gage* v. *Pumpelly,* 115 U. S. 454, and *Reynolds* v. *Stockton,* 140 U. S. 254, but also in conflict with decisions by other circuit courts of appeal. *Goodrich Transit Co.* v. *City of Chicago,* 4 F. 2d 636, 1st headnote (7 C. C. A.), and *Osage Oil & Refining Co.* v. *Continental Oil Co.,* 34 F. 2d 585, 4th headnote (10 C. C. A.).

## POINT V.

**The court of appeals erred in holding that the decree in the case of Hemphill v. Duval Cattle Company et al., reported 41 F. 2d 433, was res judicata as to Mrs. Bostwick.**

The brief for respondents, pages 4 and 5, undertakes to sustain the ruling of the Court of Appeals on this point. Counsel insist that the consideration given by the Court of Appeals to *Griley* v. *Marion Mortgage Company,* 132 Fla. 299, 182 So. 297, was correct

> "because there the beneficiaries were known or named."

We think that an entirely erroneous observation. The entire opinion of the Supreme Court of Florida in the Griley case fails to show whether the beneficiaries under the mortgage were known or unknown. Apparently the actual parties to the suit made no effort to name them and considered Marion Mortgage Company the only necessary party *plaintiff* when it brought suit to foreclose the original mortgage and considered its successor trustee as the only necessary party *defendant* when Griley, the assignee of the subsequent mortgage, brought suit to foreclose the same. The Supreme Court of Florida propounded this question:

> "Were the beneficiaries of the trust estate necessary parties to the foreclosure suit?"

The court then observes that they were not made parties to the suit and then stated the law of the subject as follows:

> "The law is settled that, in suits against the trustee affecting trust property, the trustees as well as the *cestuis que trustent* should be made parties defendant. *Carey* v. *Brown*, 92 U. S. 171, 23 L. Ed. 469."

Rule 29 of Florida Equity Rules cited in our former brief, page 36, adopted in 1873 and found in the preliminary part of Volume XIV of Florida Reports, page 47, still in force when the federal tax suits were brought, provides:

> "Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court, in its discretion, may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it; *but in such cases the decree shall be without prejudice to the rights and claims of all the absent parties*" (Italics ours).

Thus for half a century prior to the bringing of the Hemphill tax suits this rule had been regarded as a rule

of property in Florida and the decision in the Griley case was an affirmation thereof.

Counsel for respondents also attempt to support the application which the Court of Appeals made of *Kersh Lake Drainage Dist.* v. *Johnson,* 309 U. S. 491. We think the application so made by the Court of Appeals was entirely erroneous as applied to the question of whether or not mortgage bondholder beneficiaries should have been named parties defendant to the Hemphill suit or some showing made that they were too numerous or were unknown. The Kersh Lake Drainage District case held as stated in the opinion of the Court of Appeals, but that holding related to the position of certificate holders, in substance bondholders, of the Drainage District in a suit where the Drainage District or rather its commissioners were *plaintiffs* in a suit brought to enforce drainage district assessment liens for the *benefit* of such certificate holders. The court in considering the position of the commissioners and of the certificate holders with respect to such a suit pointed out that the very statute under which the certificates were issued made it the duty of the commissioners to protect and enforce creditor's rights on obligations issued by the district. Here the Trustees under the mortgage were not the plaintiffs. Neither did they have such powers as the commissioners had in the cited case. Counsel for respondents have wholly omitted to take any note of the Kersh Lake case with regard to the proposition for which it was cited in our petition, because it was distinctly held on the last page of the opinion that *landowners were not bound* by former proceedings in which the district or its commissioners were parties but to which the landowners were not parties. Counsel have evaded that proposition and thereby, as previously observed, they have left wholly unanswered Point I as above stated.

The opinion of the Court of Appeals and the argument for respondents here wholly omitted, in discussing the

doctrine of *res judicata*, to recognize the necessity of at least four "identities" between this proceeding and the former tax foreclosure proceedings. In the case of *Lyon* v. *Perin & Gaff Mfg. Co.*, 125 U. S. 698, 700, 31 L. Ed. 839, 840, this court said:

> "It is well settled that in order to render a matter *res adjudicata*, there must be a concurrence of the four conditions, *viz.*: (1) Identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) identity of the quality in the persons for or against whom the claim is made."

The Supreme Court of Florida has repeatedly held the same identities requisite. *Lake Region Hotel Co.* v. *Gollick*, 111 Fla. 64, 149 So. 205, 1st headnote. Here, as previously noted, the drainage district was the sole defendant in the suit brought by Kreitmeyer as an alleged coupon holder. The situation in the ancillary suit of *Hemphill* v. *Duval Cattle Company* was no better as respects parties, because Mrs. Bostwick was not and never became a party thereto and the Drainage District was not a party unless represented by the receivers. Again there was no identity of the thing sued for. The Kreitmeyer suit had for its sole object, when in effect amended by his petition (R. 177 to 182), the appointment of a receiver to collect alleged delinquent drainage taxes. The object of the answer of petitioners Bostwick and Jacksonville Heights Improvement Company (in effect an independent bill) was to have their titles to the deposits for the four parcels in question recognized and to have the counterclaims of title on behalf of the Drainage District resulting from the levy of illegal drainage taxes and receivership decrees therefor cancelled insofar as might be necessary to clear the way for the distribution of said funds to petitioners. Furthermore there was no identity of cause of action. Kreitmeyer sued to have a receiver appointed. The receiver sued to collect taxes. These petitioners by their answer sued to have the taxes declared illegal and the re-

ceivership decrees declared void because the taxes were wholly without authority and because the decrees were without jurisdiction and otherwise subject to attack. Many of the grounds set up by the petitioners in that behalf were recognized by the District Court (R. 275) as not heretofore

"settled by the Supreme Court of Florida"

nor settled by the district court.

Another principle entirely overlooked by the Court of Appeals and by counsel for respondents is stated in 30 Am. Jur., subject "Judgments," Sec. 233:

> "The general rule is that parties to a judgment are not bound by it in subsequent controversies between each other where they are not adversaries in the action in which the judgment is rendered * * * the theory of the many decisions supporting the general rule is that the judgment merely adjudicates the rights of the plaintiff as against each defendant and leaves unadjudicated the rights of the defendants as among themselves."

In the proceeding now before the court the petitioners as landowners are on one side and the Drainage District on the other. If they were adversaries in the Hemphill tax foreclosure proceedings, then the Drainage District, a Florida corporation, was the real plaintiff and that destroyed federal jurisdiction. If they were co-parties then according to the rule last above quoted the decrees therein were not *res judicata*. By either horn of the dilemma the opinion of the Court of Appeals was contrary to the decisions of this Court.

## POINT VI.

**If the trustees did represent Mrs. Bostwick in the Hemphill tax suit then the court of appeals was still in error in not holding that she had the right in this proceeding in equity to attack as she has done the tax decree for fraud or mistake arising from the fact that the supervisors, the receiver and his counsel either by design or mistake concealed from the trustees valid defenses now described in Sections XVII-A and XI and XII of petitioners' answer.**

As an answer to this point counsel for respondents assert, pages 5 and 6 of their brief, that Mrs. Bostwick does not claim she did not know of tax foreclosure suit or that the mortgage trustees failed to make defense and that she does not offer to do equity by paying any tax, and so forth. That line of argument wholly fails to meet the attack stated as Point VI.

Section XVII-A, bottom R. 212, in effect makes Section XVII part thereof. Section XVII, bottom page 206 to 210, says in effect that *if* Mrs. Bostwick, then a married woman, was represented by the mortgage trustees, then she in their stead is still entitled to relief because

> "said receiver and his counsel either by design or by accident or by mistake withheld necessary documents and data and thereby prevented (said trustees) from making such defense as they otherwise would have made."

Details are then given as to matters and data and documents so withheld, following which it is further alleged, R. 209:

> "That the deception and concealment of the true facts thus accomplished first by the Supervisors and later by the receiver and his attorney precluded and prevented said mortgage trustees from making proper and adequate defense in said Duval Cattle Company case."

Circumstances are then alleged showing that petitioner (respondent Mrs. Bostwick) has not been lacking in diligence in discovering said matters. Section XVII-A of the answer, beginning R. 210, sets out further matters of illegality and fraud, knowledge of which was not discovered until the last few months before the filing of petitioner's answer. All those averments were admitted by the attacking motions of the Drainage District. In such circumstances a party standing in the position of Mrs. Bostwick, even if she through the trustees was represented in the tax foreclosure suit, is entitled to relief in equity by an original bill or any other proceeding equivalent thereto. Such a bill or its equivalent is a *direct attack* upon a decree obtained by the opposite party as the result of such concealment, irrespective of whether the concealment resulted from fraud, accident or mistake. Pomeroy and Freeman are cited to that effect, page 37 of our former brief. A recent leading decision from the Supreme Court of California to like effect is *Caldwell* v. *Taylor,* 23 Pac. 2d 758, 88 A. L. R. 1197, 4th and 5th headnotes. See also *Seay* v. *Hawkins,* 17 F. 2d 710 (10 C. C. A.). 1 Freeman on Judgments (5th Ed.), Section 308. 31 Am. Jur., subject "Judgments," Sec. 653.

We shall presently point out that since petition for certiorari was filed in this cause the State Court has rendered a decision squarely sustaining the defenses presented by Sections XI and XII of the answer filed by petitioners (respondents below), R. 141 to 163, and those defenses now held good by the State Court are the matters which were concealed by the supervisors, receiver and his counsel from the mortgage trustees during the course of the Hemphill tax foreclosure suit against Duval Cattle Company. The following rule stated in 3 Freeman on Judgments (5th Ed.), Section 1214, page 2523, is also applicable to Point VI now under discussion:

> "the judgment from which relief is sought does not operate as *res judicata* as to the matters adjudicated

by it where a party has been prevented from presenting his case by fraud, mistake or other matters affording ground for equitable relief."

## POINT VII.

**The court of appeals erred in not sustaining the attack made by Section XV of petitioners' answer, namely that the federal tax decrees were predicated upon void state decrees the invalidities of which were pointed out in said Section XV and prior sections cited therein.**

This point was briefly discussed at page 37 of our petition and supporting brief. This point was also stated as Question I, page 19, of our petition, as follows:

> "I.—If the records made in the Hemphill tax suits show on their faces that the decrees therein were predicated upon state court decrees, which state court decrees were in turn void on account of matters appearing upon their faces or appearing upon the faces of the records therein entered, do such federal tax decrees fall with the state decrees?"

Since the filing of our petition the state circuit court has entered a decision in the case of *Macclenny Turpentine Company et al.* v. *Baldwin Drainage District et al.*, which we cited R. 110, R. 267 and R. 275. That decision we believe has a very material bearing on the solution of the question as last above restated.

We are attaching as Appendix A to this brief a certified copy of the subject index of the amended bill filed in the Macclenny Turpentine Company case. In connection with that index we shall point out how that bill presented the same subject-matter and the same questions which are presented by corresponding sections of petitioners' answer filed in this suit. We have next attached as Appendix B a certified copy of motion to strike attacking the several sections of said amended bill. Lastly we have attached hereto as Appendix C a certified

copy of the court order and decision rendered April 3rd, 1943.

This order and decision of the state court is we think important because this court in the case of *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169, 85 L. Ed. 109, held that the federal courts should follow the state courts in the interpretation of state statutes even though only a state chancery court had up to such time given such interpretation. In that particular case it was held that a decision by the court of chancery of New Jersey should be followed because as the matter then stood it could not be known that the highest state court would ever disapprove or overrule the decision of the chancery court. Under Section 11, Article V of the Florida Constitution, circuit courts in Florida stand next to the Supreme Court of the State and are given exclusive original jurisdiction

> "in all cases involving the legality of any tax, assessment or toll."

In the case of *West* v. *American T. & T. Co.*, 311 U. S. 223, 85 L. Ed. 139, and in *Six Companies of Cal.* v. *Joint Highway Dist., No. 13*, 311 U. S. 180, 85 L. Ed. 114, this court held that federal courts should follow the decisions of intermediate state courts in the construction and interpretation of state statutes. In Florida we have no such intermediate appellate courts. In *Railroad Commission of Texas* v. *Pullman Company*, 312 U. S. 496, 85 L. Ed. 971, it was pointed out that a federal court in undertaking to give an interpretation of a state statute in advance of interpretation thereof by the state courts could only make

> "a tentative answer which may be displaced tomorrow by a state adjudication."

In *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168, 86 L. Ed. 1355, this court again held that until the state courts had spoken with regard to the meaning of the particular ordinance in question any determination by the federal court in regard thereto

> "could not be anything more than a forecast—a prediction as to the ultimate decision of the Supreme Court of Illinois."

In the *Pullman Company case, supra,* 312 U. S., text 500, the court pointed out that the "tentative" or "forecast" character of a federal decision in such case was recognized by the rulings made in *Glenn* v. *Field Packing Co.,* 290 U. S. 177, and *Lee* v. *Bickell,* 292 U. S. 415. On turning to the Glenn case we find that it was an attack upon an excise tax imposed on oleomargarine by the State of Kentucky and that the district court had held the tax invalid. This court modified the decree by directing that a provision be inserted therein to the effect that the State Tax Commission

> "may apply at any time to the court below, *by bill or otherwise,* as they may be advised, for a further order or decree, in case it shall appear that the statute has been sustained by the state court as valid under the state constitution" (Italics ours).

In short, the door was to be left open for a change in the federal decision "by bill or otherwise" in the event the state court should put a different interpretation upon the statute. *Lee* v. *Bickell* was a similar case where an attack was made upon a state excise tax statute. The district court sustained the attack upon the statute but in support of the 5th headnote this court pointed out that

> "the parties to the controversy should have adequate protection in the possible contingency of a decision by the Supreme Court at variance with ours in respect of the meaning of the statute, a meaning that will then be declared with ultimate authority. * * * There should be an appropriate opportunity in such circumstances to terminate or modify the restraints of the decree. *There should also be an opportunity to renew the litigation in respect of the issue of constitutional validity*" (Italics ours).

The Glenn case was then cited for the appropriate practice. The case of *Wald Transfer & Storage Co.* v. *Smith,*

290 U. S. 602, 78 L. Ed. 528, was a similar case. It was there ordered that the previous decrees entered by the district court should be modified by providing that the appellants might

> "apply *at any time* to the district court, *by bill or otherwise*, as they may be advised, for a further order or decree, in case it shall appear that the state court shall have construed the applicable state statute as not authorizing the State Commission to enter the orders challenged in this proceeding" (Italics ours).

In the case at bar the petitioners filed a motion in the court below, R. 265, requesting the court to defer consideration of the motion to dismiss and motion for injunction filed by the Drainage District on the ground, R. 267, that the Macclenny Turpentine case was then pending before the state court and that the questions concerning the true interpretation of the statute would have a material bearing upon all the questions presented by the answer of these petitioners and that the questions appertaining to the former federal tax foreclosure decrees were interwoven with the questions attacking the validity of all taxes levied by the Drainage District and we cited the Pullman Company case and the Field case. The court below made two orders resulting from that motion. One, R. 274, 275, deferring the consideration of all questions, pending the state court decision, relating to all parcels not affected by the former federal tax foreclosure decrees. By the second order, beginning R. 276, the court undertook to segregate the four parcels affected by the former tax foreclosure decrees from the other thirty-eight parcels and proceeded to make a declaration of title in favor of the Drainage District without waiting to find out what would be the state court's interpretation of the statute in the sundry particulars raised by the answer of these petitioners. Appeals were taken from that second order and now since the taking thereof we have the state court's interpretation of the statute in many particulars. These

petitioners are now entitled "by bill or otherwise" to have the decree appealed from vacated and also to have the tax foreclosure decrees vacated so that these petitioners affected by said tax decrees may stand on the same footing as other landowners interested in the other thirty-eight parcels involved in this proceeding.

The decisions of the Supreme Court of Florida are in harmony with the decisions of this court last above cited to the effect that if taxes or assessments are initially sustained under a particular statute as against particular properties but afterwards it is determined that such statute is unconstitutional, then the owners of properties affected by such former decree will be entitled to relief by original bill after the time for appeal from the former decree has elapsed, to the end that all taxpayers may have equal treatment under the law consistent with Sections 4 and 12 of the State Bill of Rights and consistent with the equality provisions in tax matters contained in Section 1, Article IX, of the State Constitution.

In this behalf we cited *In re Newkirk,* 114 Fla. 562, 154 So. 323, 4th headnote. The 3rd headnote of this case and the text relating thereto concedes as a general proposition that a decree based upon an unconstitutional statute is not later open to collateral attack. Nevertheless as applied to the imposition of taxes the rule of property in Florida, as shown by the Newkirk case, is to give relief by bill in equity if it is subsequently determined that the statute undertaking to impose the taxes was in fact unconstitutional. The Newkirk case has been followed in several subsequent decisions, notably in *Jackson Grain Co. v. Lee,* 139 Fla. 93, 190 So. 464. There the particular excise tax statute was held void or inoperative as to the business of the complaining party, but afterwards the court in another case held the statute applicable to that particular class of business. Thereupon the State Comptroller acting for the state filed a bill and got the original decree

vacated, the court laying down this general principle, 1st headnote:

> "All persons, firms and corporations of Florida are equal before the law and especially is this true on the question of assessment and collection of taxes."

According to the decision of the state court now rendered in the Macclenny Turpentine case all of the taxes ever levied by the Baldwin Drainage District against the other thirty-eight parcels involved in this condemnation suit are wholly void and can never be collected. That results from the state court's present interpretation of the statute, whereas for the other four parcels involved in these appeals, title to which is now claimed by the Drainage District under the federal tax foreclosure decrees, relief has been denied though the taxes levied, as a basis for the present claim of title, were predicated upon the same invalid statute and the same void proceedings. In the case of *State for Use of Groves et al.* v. *Wilkins-Austin Corporation,* .....Fla. ....., 8 So. 2d 275, the Supreme Court of Florida followed the Newkirk case in granting relief against a former decree undertaking to enforce certain drainage district taxes, the statute having been later found to be invalid. The case of *City of Winter Haven* v. *Lake Elbert Citrus Fruit Co.,* 122 Fla. 422, 165 So. 360, 1st headnote and supporting text, is to like effect. These decisions by the Supreme Court of Florida and the above mentioned decisions by this court undoubtedly entitle these petitioners to have relief against the former tax foreclosure decrees and the resulting master's deeds to the Drainage District because the state court has now so construed the drainage statute as to make all the taxes levied by his District utterly void. This is especially so when, as alleged in Section XVIII of petitioners' answer, beginning R. 213, neither the Drainage District nor its bondholders have suffered any prejudice by delay. The allegations of that paragraph, like all the others in the answer of petitioners, were admitted by the attacking motions of the District.

We shall now briefly analyze the order and decision of the state court.

Section V of the amended bill in the Macclenny Turpentine case was substantially the same as Section IV of the answer of petitioners, beginning R. 94. The Circuit Judge held that paragraph not to state a good ground of attack and granted the motion to strike the same, his view being that the original decree of the state court quoted R. 99 to 102 of this record was sufficient to include the plaintiffs' lands (and petitioners' here) within the District even though names of individual owners were not shown by the decree, and even though their individual properties were not described opposite their names.

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Section VI of the amended bill in the state court was a substantial copy of Section V of petitioners' answer, R. 104 to 112. Section VI of the amended bill as filed in the state court carried as a statement of the subject-matter the following heading:

> "NOT STATUTORY OR CONSTITUTIONAL TO INCLUDE IN A SINGLE DRAINAGE DISTRICT FOUR SEPARATE AND DISTINCT WATERSHEDS HAVING NO COMMON INTERESTS."

The headings thus given to each individual section of the amended bill were restated as the subject index thereof and certified copy is attached hereto as Appendix A. Section V of petitioners' answer, Section VI of the bill, starts out with the allegation that the Circuit Court of Duval County had no jurisdiction or power under the State Drainage Law or under state or federal constitutions to enter the original decree of January 19th, 1916, including in a single drainage district four separate and distinct watersheds having no common interests, that is to say, noncontiguous in physical conditions, noncontiguous as to flow of water and outlets, noncontiguous as to interests and noncontiguous as to plans of drainage or improve-

ments which might have been proposed or provided for. A description of the several watersheds is then stated as set forth in the record made in that original proceeding. It is further pointed out, R. 109, that to thus construct a drainage district would violate the due process and equal protection clauses of the state and federal constitutions and also violate Sections 28 and 29 of Article XVI of the State Constitution. It is further pointed out bottom R. 109 and first half of R. 110 that large sums of money were wasted or spent on projects in other areas which were of no possible benefit to the lands of respondents (petitioners here) in the Cecil Field area. That large expenditures and waste of money in other watersheds resulted from illegal contracts and other conditions for which the respondents (petitioners here) were not responsible

> "yet the common burdens resulting therefrom and from putting out a second bond issue and even a third bond issue were spread over the lands of these respondents in the Cecil Field area and drainage taxes have been continuously levied from year to year on account thereof, all with the result that these respondents have been deprived of their said properties without due process of law and without equal protection of the laws, contrary to the due process and equal protection clauses of the state and federal constitutions."

It is thus seen that by sustaining Section VI of the amended state bill—Section V of petitioners' answer in this cause—the state court has held that the inclusion of the Yellow Water District watershed of which Cecil Field is a part in the same drainage district along with three other separate and distinct watersheds (or vice versa) was *an unconstitutional application of the state drainage law, with the result that the original state decree so providing was void.* Practically all of the matters pleaded in that behalf are matters of record and therefore there will be little room for the taking of oral testimony or any other sort of evidence outside the record as actually made in

the original state court proceeding. Such a holding means that all of the taxes ever levied by this District were void and unconstitutional from their inception. Among the authorities cited to the state court in support of Section VI of the bill—Section V of the answer here—were *Ocean Beach Heights* v. *Brown-Crummer Invest. Co.*, 302 U. S. 614, *Wurts* v. *Hoagland*, 114 U. S. 606, *Duncan* v. *St. Johns Levee and Drainage District*, 69 F. 2d 342, 8 C. C. A., *Consolidated Land Co.* v. *Tyler*, 88 Fla. 14, 101 So. 280. *Scilley* v. *Red Lodge-Rosebud Irr. Dist.*, (Mont.) 272 Pac. 543, and similar cases.

Subparagraph (b) of Section XV of petitioner's answer, R. 194, made specific complaint that

> "Because said Federal decrees were predicated upon an unconstitutional effort to include the area now known as Cecil Field in a drainage district that would include within its boundaries 4 separate watersheds noncontiguous in conditions and noncontiguous in interests and noncontiguous in possibilities of drainage, all as pointed out in Section V of this answer."

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Section VII of the amended bill in the Macclenny Turpentine case was substantially the same as Section VI of petitioners' answer. The state court held this section to be without merit because in his view it was not jurisdictional that the notice of the filing of the commissioners' report carry a list of the properties within the District.

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Section VIII of said bill was thus entitled:

> "ASSESSMENTS OF BENEFITS AND DAMAGES NOT MADE AS REQUIRED BY LAW."

That section was substantially the same as Section VII of petitioner's answer, beginning R. 118, except that the latter part of R. 122, all of R. 123 and last half of R. 125 were

omitted and other illustrations substituted with respect to the watershed where the lands of Macclenny Turpentine Company *et al.* are situated. The *bases of attack* are however the same in both pleadings. The holding of the state court refusing to strike that section means that the report of the commissioners and the engineer's report referred to therein show on their faces that the pretended assessments of benefit were wholly arbitrary and unreasonable and that the formulas, theories and processes applied by the commissioners were contrary to the mandates of the statute and contrary to constitutional safeguards. Section 17 of the drainage law of 1913, now Section 1467, Compiled General Laws of Florida, made a legal assessment of benefits and damages a condition precedent to the levy of any drainage tax assessments. Therefore the holding of the state court as to Section VIII of the bill, Section VI of the answer here, goes to the root of the tree and destroys all assessments of every nature ever made by this District.

At top R. 195 specific complaint is made that the Hemphill tax foreclosure decrees were predicated upon those

> "arbitrary, unjust and illegal assessments of benefits."

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The decision of the state court held Section IX of the state bill to be without merit and struck the same. That section was a combination of Sections VIII and IX of petitioners' answer. That holding as to Section IX of the state bill is in harmony with the state court's holding as to Section V of the state bill to the effect that it was not necessary for the original decree to show the names of owners or the descriptions of their properties opposite their names.

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The state court next proceeded, however, to sustain Sections X, XII and XIV of the state bill, the titles to which sections were respectively as follows:

> "INSTALMENT TAXES, LEVIED FOR NONNEGOTIABLE BONDS ISSUED FOR CONSTRUCTION CONTRACTS LET WITHOUT COMPETITIVE BIDDING, CANNOT BE ENFORCED."
>
> "NO LEGAL INSTALMENT TAXES WERE EVER LEVIED AFTER 1917 BECAUSE ALL CONSTRUCTION WORK DONE AFTER FEBRUARY, 1918, WAS BASED ON UNAUTHORIZED AND ILLEGAL CHANGES AND AMENDMENTS TO THE PLANS OF RECLAMATION AND THE SECOND AND THIRD BOND ISSUES WERE BASED UPON SUCH ILLEGAL CHANGES AND AMENDMENTS, WHEREAS ALL LEVIES OF TAXES WERE BASED ON THE ORIGINAL ASSESSMENTS OF BENEFITS."
>
> "PROPOSED DRAINAGE WORKS AND IMPROVEMENTS NEVER CARRIED OUT OR PUT INTO EFFECT UNDER EITHER THE ORIGINAL PLANS OR THE AMENDED PLANS—PLANS ABANDONED AS A WHOLE AND IN THEIR SEVERAL PARTS."

Those sections were attacked on numerous grounds by the District's motion to strike (see Appendix B hereto). Those three sections of the amended bill were largely copied from Section XI of petitioners' answer beginning with subparagraph (c), R. 142, and from Section XI of petitioners' answer, beginning R. 151. The construction contracts were void for want of competitive bidding as alleged R. 142 and 146. The bonds issued in exchange therefor were nonnegotiable under state statutes and state decisions. See page 9 of our petition in this cause. The amendments to the plans of reclamation evidenced by the maps, Exhibits C, D and E, R. 145 and R. 245 to 249, and as otherwise explained R. 145 to 147, were in direct violation of what are now Sections 1491 and 1500, Compiled General Laws of Florida. The second bond issue and the third bond issue were made to carry out those un-

authorized and illegal changes in the plans of reclamation, chiefly intended for the benefit of watersheds other than the one in which this particular air field is now situated. Thereafter, however, all tax assessments were based on the original pretended assessments of benefits reported in August, 1916, without any reassessments of benefits as specifically required by Section 1500, Compiled General Laws of Florida. *The holding of the state court sustaining said Sections X, XII and XIV of the amended bill means that all tax assessments levied since* 1917, *irrespective of other attacks, are totally void. The state court's holding with respect to the subject-matter of those three sections of the amended bill results from the state court's interpretation of the drainage law as applied to the subject-matter of those sections respectively.* The matters complained of in Sections X, XII and XIV of the state bill, here Sections XI and XII of petitioners' answer, are matters now provable by the records of the District uncovered shortly before this condemnation suit was started.

Tax assessments imposed for illegal contracts and for void bonds and based upon illegal assessments of benefits, are just as bad as if the state court had determined that the drainage statute was void in its entirety.

The above mentioned constructions and rulings of the state court are what the district court held, R. 275, he would wait for as to the thirty eight parcels not affected by the Hempbill tax decrees. *Glenn* v. *Field Packing Co., supra,* and in *Lee* v. *Bickell, supra,* mean that the door of the federal court should be held open to "renew the litigation" in respect to the same illegal taxes which were involved in the Hemphill tax decrees. Otherwise equality in Florida tax matters would be destroyed contrary to *Jackson Grain Co.* v. *Lee,* 139 Fla. 93, *supra,* and *State* v. *Wilkins-Austin Corporation,* 8 So. 2d 275, *supra.*

The state court also sustained Section XIII of the bill, the title to which was as follows:

> "INSEPARABLE PARTS OF INSTALMENT TAXES WHICH WERE LEVIED AGAINST THE PLAINTIFFS' LANDS, AROSE FROM THE EXPENDITURE AND WASTE OF MONEYS IN OTHER WATERSHEDS UNDER ILLEGAL CONTRACTS AND ILLEGAL BONDS ISSUED FOR THE SUPPOSED BENEFIT OF SUCH OTHER WATERSHEDS."

That section was the same in substance as Section XIII of petitioners' answer, R. 163, *et seq.* By sustaining Section XII of the bill the state court in effect held that all of the second bond issue and all of the third bond issue were void. The aggregate levies made as complained of in Section XIII of the bill, also Section XIII of the answer, supplied another cause for the invalidity of all the levies made since the second and third bond issues were put out.

The motion to strike filed by the district did not specifically attack Sections XIV, XV and XVI of the amended bill but at the oral argument the motion was treated as addressed to them also. Therefore the state court's order means that those sections are severally sustained.

## POINT VIII.

**The court of appeals erred in not sustaining the contention of petitioners to the effect that the chain of facts and circumstances set out in Sections IV to XIII and XVII and XVII-A of their answer made it inequitable and unconscionable for the Drainage District and its present majority bondholders to maintain the claim of title acquired in such manner.**

This point was briefly discussed at page 35 of our former petition and brief. Very little notice is given to this point by the brief for respondents but we do find

at page 4 thereof the following statement in regard to the subject-matter:

> "Petitioners have not raised this question in their petition or brief and it is not urged as reason for the writ."

Both angles of this statement are incorrect. The above Point VIII contained in our brief is the answer to the one angle and the "ninth" reason for the writ, stated page 23 of our petition, is the answer to the other angle. The decision of the state court as above explained is another very important reason why a court of equity should exercise its inherent power to intervene in order to prevent a miscarriage of justice see cases cited page 10 of our petition.

The Drainage District voluntarily gave to its answer, R. 61 to 73, two "intendments." One claiming as *tax lienor*. The other claiming as *fee owner*. The weaker of these two must be applied. *U. S.* v. *Linn*, 1 How. 104, 111, 11 L. Ed. 64, 66. *Barco* v. *Doyle*, 50 Fla. 488, 39 So. 103, 1st headnote.

We respectfully submit that the writ of certiorari should issue as prayed for.

THOS. B. ADAMS,
1006 Bisbee Building,
Jacksonville, Florida,
*Attorney for Petitioners.*

Postscript: Since the preparation of the foregoing brief, in fact after the printing thereof had already been set up, counsel for the respective parties in the case of Macclenny Turpentine Company et al., vs. Baldwin Drainage District et al., agreed that it would be desirable to have the Supreme Court of Florida pass upon the various questions of law ruled on by the Circuit Judge in his Order of April 3rd, 1943, as per Appendix C attached to this brief, whereupon counsel for the defendants in the Macclenny Turpentine Company case prepared a motion

addressed to the Court in that case to defer the filing of an answer by defendants pending an appeal to the Supreme Court of Florida, and counsel for the plaintiff in that case agreed to the order so requested. That a copy of the motion so made is attached hereto as Appendix D. That as a result of said joint decision to seek a review by the Supreme Court of Florida of all the points ruled upon by the Circuit Judge it is expected that the Supreme Court of Florida will at an early date review and decide the various questions already decided by the Circuit Judge.

THOS. B. ADAMS.

## APPENDIX A.

In the Circuit Court, in and for Duval County, Florida. Macclenny Turpentine Company, a Florida Corporation, et al., Plaintiffs, v. Baldwin Drainage District, a Purported Public Corporation, R. V. Covington, A. W. Inglis and W. D. Brinson, As Purported Supervisors of Baldwin Drainage District, J. W. Harrell, et al., Defendants. No. 48243-E

**Amended Bill of Complaint.**

SUBJECT INDEX

*State of Florida County of Duval*

I, Elliot W. Butts, Clerk of the Circuit Court in and for Duval County, Florida, do hereby certify that the foregoing is a true and correct copy of the subject index to the amended bill of complaint filed in said cause on January 21, 1943.

Witness my hand and official seal of said Court this the 24th day of April, 1943.

(Sgd) Elliot W. Butts

(Court Seal) Clerk of the Circuit Court in and for Duval County, Florida.

(Sgd) By L. W. Thomas
Deputy Clerk.

## APPENDIX B.

In the Circuit Court, in and for Duval County, Florida In Chancery No. 48243-E Macclenny Turpentine Company, a Florida, Corporation, et al., Plaintiffs, vs. Baldwin Drainage District, a public corporation, et al., Defendants.

**Motion to Strike.**

Come now the Defendants herein and move to strike the following portions of the Bill of Complaint for the reasons hereinafter set forth.

1. All of Section 2 of said Bill, because

(a) The issuance of tax deeds by the State of Florida not only did not cancel the taxes levied by said Drainage District, but the purchasers took subject to them.

(b) The Legislature of Florida in 1927 abolished the priority of the lien of State taxes over drainage taxes, and the Bill of Complaint shows that the tax titles of the various Complainants were issued after 1927.

2. All of Section 3, because

(a) The Statute of Limitations is not applicable to liens enforcible in a court of equity, especially liens for special assessments.

(b) The taxes were levied for the benefit of the bondholders of said District, and it appears that the bonds have not been paid.

3. All of Section 5, because

(a) It affirmatively appears from the Bill of Complaint that the notice of application to form said Drainage District was in the form prescribed by the statutes of the State of Florida, and the statute does not prescribe a form of decree organizing the District.

(b) The Bill affirmatively shows that regardless of the validity of the decree, the District has functioned and is still functioning as a *de facto* organization, which issued obligations that were validated by the Court, and the taxes levied for the payment of its debts are the only method by which said debts can be paid.

(c) Complainants seek to attack the validity of the incorporation of the District, and a property owner cannot question the validity of the organization of the District, and the State of Florida and Complainants are estopped from attacking the organization of this District.

4. All of Section 6, because

(a) Complainants seek to collaterally attack a decree of the Circuit Court of Duval County after rights of third parties had been acquired in reliance upon the same.

(b) The Bill of Complaint shows that the matter therein set forth was not made a matter of defense in the proceedings for the organization of the District, and the then owners and all subsequent owners were concluded by the decree of incorporation.

(c) The Bill affirmatively shows that the District was and is a *de facto* District, which is still indebted to its bondholders, and the taxes levied by said District are the only means of paying the same.

5. All of Section 7, because

(a) It affirmatively appears that the notice of filing the Commissioners' Report was in the form required by statute.

(b) It is an attempt to collaterally attack a decree of the Circuit Court twenty-five years after its entry.

(c) Complainants were not property owners in the District at the time of said proceeding, and do not show that they acquired their alleged rights in the property in reliance upon the invalidity of said decree, or without

knowledge of the assessments and taxes levied pursuant thereto.

(d) Complainants are estopped by reason of the facts and circumstances alleged in the Bill from questioning the assessment of benefits to which those who owned lands at the time said proceeding was instituted did not object.

6. All of Section 8, because

(a) Complainants are estopped from attacking the manner in which the benefits were assessed.

(b) Neither those who were, at the time the matters complained of occurred, owners of the property now claimed by the Complainants, nor their successors in title, objected to the special assessments at the time the same were made, or within a reasonable time thereafter.

(c) The facts alleged in said Section were matters that should have been set up by the then owners by way of objection to confirmation of the assessments, and the Bill fails to allege that any objections were filed to confirmation of the report, and more than twenty-five years have elapsed since said report was confirmed.

7. All of Section 9, because

(a) The validity of the taxes levied by the District cannot be questioned by the present owners of said land after the expiration of the time which has expired since the original total tax and the various installments thereof were levied, and after the bonds of the District have been sold.

(b) The form of the certificate attached to a Tax Book cannot invalidate the tax levied if it was levied to pay debts of the District, which is at least a *de facto* if not a *de jure* one, and the Bill shows that taxes were levied for indebtedness incurred by said District in reliance upon the failure of landowners to object thereto.

(c) The statute did not require that the Decree of Incorporation should include a list of the names of the owners of said land.

8. All of Section 10, because

(a) The bonds of the District are negotiable instruments, and facts alleged in said Section relate solely to an alleged equity of the District against the contractors, whose work was finished more than twenty years ago.

(b) The owners of the land at the time the transaction complained of occurred, and at the time the construction work was completed, made no objection to the contract or manner of construction, and no objection has been made by anyone before the filing of this Bill of Complaint, more than twenty-five years later.

9. All of Section 11, because

(a) The bonds of the District are negotiable instruments, and facts alleged in said Section relate solely to an alleged equity of the District against the contractors, whose work was finished more than twenty years ago.

(b) The owners of the land at the time the transaction complained of occurred, and at the time the construction work was completed, made no objection to the contract or manner of construction, and no objection has been made by anyone before the filing of this Bill of Complaint, more than twenty-five years later.

10. All of Section 12, because

(a) The bonds of the District are negotiable instruments, and facts alleged in said Section relate solely to an alleged equity of the District against the contractors, whose work was finished more than twenty years ago.

(b) The owners of the land at the time the transaction complained of occurred, and at the time the construction work was completed, made no objection to the contract or manner of construction, and no objection has

been made by anyone before the filing of this Bill of Complaint, more than twenty-five years later.

11. All of Section 13, because

(a) There is no requirement, statutory or otherwise, that the annual installment levies should be allocated to any particular bond issue, since all levies constituted a pool for the payment *pro rata* of all bonds.

(b) It is immaterial on which part of said District the proceeds of any particular issue was spent, since the District is a corporate unit and its obligations are corporate obligations, and taxes levied for the payment of its bonds were parts of one assessment of benefits and for the construction of a single improvement project.

12. All citations of cases and references to statutes contained in the

Last 11 lines of page 7,
Lines 14, 15, 16 and 17 of page 12,
Lines 6 and 7, and 14, 15 and 16 of page 13,
Lines 14, 15, 16, 17, 18 and 19 of page 28,
Lines 4, 5, 6, 7, 8 and 9 of page 29,
Line 16, and the last 6 lines of page 35,
Lines 14, 15, 16, 17, 18 and the last 3 lines of page 40,
Lines 15 and 16, and the last 3 lines of page 59,
Lines 1 and 2 of page 60,
Lines 15 and 16, and the last 3 lines of page 64,
Lines 14, 15, 16, 17, 18 and 19 of page 89,

because

(a) It is not permissible to include a brief and citations of authorities in a pleading in equity.

(b) Said matter is immaterial and irrelevant to the issues involved in said Bill of Complaint.

(Sgd) Giles J. Patterson
(Sgd) J. W. Harrell
Attorneys for Defendants.

*State of Florida Duval County*

I, Elliot W. Butts, Clerk of the Circuit Court in and for Duval County, Florida, do hereby certify that the foregoing is a true and correct copy of motion to strike filed by the defendants in said cause January 29th, 1943.

Witness my hand and seal of said Court this the 24th day of April, A. D. 1943.

(Sgd) Elliot W. Butts
Clerk of the Circuit Court
in and for Duval County,
Florida.

(Sgd) By L. W. Thomas
Deputy Clerk.

(Court Seal)

## APPENDIX C.

In the Circuit Court of the Fourth Judicial Circuit of the State of Florida in and for Duval County. In Chancery. Case No. 48243-E Macclenny Turpentine Company, a Florida Corporation, et al., Plaintiffs, v. Baldwin Drainage District, a public corporation, et al., Defendants.

### Order

This cause came on to be heard upon the amended bill of complaint filed herein on January 21st, 1943, the amendment to Section IV of said amended bill, filed herein on February 5th, 1943, the further amendments to said amendment bill, filed herein on February 26th, 1943, and the several motions to dismiss and the motion to strike parts of said amended bill filed herein January 29th, 1943, which motions to dismiss and to strike are also taken as addressed to said amended bill, as amended, and the Court has heard the arguments and read the briefs submitted by counsel for the respective parties. Upon consideration thereof, it is hereby,

Ordered, Adjudged and Decreed as follows:

1. That the motion to dismiss as to all complaints, the motion to dismiss as to the interests of Emma F. Stokes and Mrs. A. K. Fouraker and the motion to dismiss as to the interests of Eleanor B. Alford Pratt and Elizabeth C. Pace, individually and as Executrix, be and the same are hereby, severally, denied.

2. That the motion to dismiss as to the interests of Nellie C. Bostwick be and the same is hereby granted as to the lands conveyed to her by Herbert Lamson and Perse Gaskins, as Special Masters and described in Section IV, sub-paragraph E, pages 20 to 22 of the amended bill of

complaint, as amended, and said bill is dismissed as to said defendant as to said lands but as to said lands only; and said motion is otherwise denied.

3. That said motion to strike is hereby granted as to Sections III, V, VII, IX and XI of said amended bill, as amended, and said Sections thereof are hereby stricken. Said motion to strike is otherwise denied.

4. That the defendants shall file such answer, or answers, as they may be advised, to said amended bill, as amended, save the parts thereof hereinabove stricken, on, or before, the Rule Day in May, 1943.

Exceptions noted for the respective parties as to all adverse rulings.

Done and Ordered in Chambers, at Jacksonville, Duval County, Florida, this 3rd day of April, 1943.

(Signed) Bayard B. Shields
Judge.

*State of Florida, County of Duval*

I, Elliot W. Butts, Clerk of the Circuit Court in and for Duval County, Florida, do hereby certify that the foregoing is a true and correct copy of the order of court made in said cause April 3rd, 1943, which said order was thereafter recorded in Chancery Order Book 312, page 217 of the records of said Court.

Witness my hand and the seal of said Court this the 24th day of April, A. D. 1943.

(Sgd.) Elliot W. Butts
Clerk of the Circuit Court
in and for Duval County,
Florida,

(Court Seal)

(Sgd) By L. W. Thomas
Deputy Clerk.